

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

January 12, 2010

The Rhode Island Ethics Commission held its 1st meeting of 20010 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, January 12, 2010, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Chair Frederick K. Butler*

Ross Cheit, Vice Chair Edward A. Magro

J. William W. Harsch, Secretary Mark B. Heffner

James V. Murray John D. Lynch, Jr.

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:00 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held

on December 15, 2009. Upon motion made by Commissioner Magro and duly seconded by Commissioner Heffner, it was unanimously

VOTED: To approve minutes of the Open Session held on December 15, 2009.

ABSTENTION: J. William W. Harsch.

The next order of business was that of advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Frank T. Caprio, the General Treasurer of the State of Rhode Island. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was present with his attorney, John Biafore, Esq. Attorney Biafore advised that originally there were 147 waiver requests, but now all 159 victims have requested waiver. In response to Chair Binder, Staff Attorney Gramitt stated that both options address recusal with respect to all of the victims, rather than just those represented by the Caprio law firm, to ensure that no one will be treated more or less favorably.

***Commissioner Butler arrived at 9:05 a.m.**

In response to Commissioner Cheit, Attorney Biafore indicated that either the individual or his attorney would file the waiver. In further

response, Judith Farley, Administrator of the Crime Victims' Compensation Program, advised that the Caprio firm had not filed any waivers. Commissioner Cheit inquired why the Caprio law firm would be considered a party or participant. He suggested that this seems to be more of an appearance of impropriety issue and stated that he is not sure that recusal would be required. Staff Attorney Gramitt advised that, based upon the Petitioner's representation that there would be no financial impact, he is in agreement that the Code would not require recusal. However, he noted that these proceedings are not investigatory, there could be other factors that could come into play, and the Petitioner has come forward out of an abundance of caution. Commissioner Cheit expressed that there can be over recusal on matters. He indicated that if recusal is to avoid making a difficult political decision and it is not required, the people deserve to have the Petitioner handle this matter.

In response to Commissioner Cheit, the Petitioner stated that he does not want there to be even a perception of a conflict. He agreed that whether the State demands subrogation is a matter of importance to the taxpayers. Commissioner Heffner asked whether there likely would be decisions made in which waiver is not granted. Ms. Farley replied that she could not elaborate on such decisions for confidentiality reasons, but she did provide a hypothetical example. Attorney Biafore agreed with Commissioner Heffner that waiver would be granted if the victim's losses are shown to exceed the compensation.

Commissioner Heffner concurred with Commissioner Cheit that the Caprio law firm is not a party or participant. The Petitioner noted that the Caprio firm referred the work to another law firm, but it continues daily work on the cases. Commissioner Heffner observed that such joint representation under the Professional Rules buttresses Commissioner Cheit's comments. He noted that there are inherently many levels of removal here and stated that he is troubled that the firm would be considered to be a participant. In response to Commissioner Lynch, Attorney Biafore advised that Attorney Jones, lead counsel, has a separate law firm.

Commissioner Butler expressed that he understands the desire to avoid any appearance of impropriety, but he is hesitant to take these matters out of the established process and procedure because of the potential adverse impact on individuals. Chair Binder suggested that the Commission consider Option 1 or issue no advisory opinion because it is not warranted. Commissioner Magro voiced his belief that there is no actual conflict, but he noted that the Commission's issuance of an advisory opinion, or its determination that there is no real conflict, does not change the basis for the Petitioner's recusal. Commissioner Heffner did not concur that there is no basis for recusal, noting the appearance of impropriety.

Commissioner Cheit stated that he does not see the logic in treating all of the victims the same here. Commissioner Lynch pointed out

that the Petitioner does not want an appearance of preferential treatment for those who were represented by the Caprio law firm, particularly where the firm still maintains client contact. He agreed that potentially everyone should be handled by the same person. Commissioner Lynch indicated that there is a perceived conflict and the Petitioner should recuse if he wishes. In response to Commissioner Harsch, Legal Counsel Conley advised that, since this involves joint representation under the Code of Professional Responsibility, he believes that the Caprio firm would still be a participant and this would appropriately be within the Commission's jurisdiction. He stated that he understands the equity argument of treating all of the victims the same, but he cautioned that the Commission does not have jurisdiction to impose a process outside of the scope of the conflict.

Commissioner Cheit suggested that if the Commission issues an opinion it should only address recusal as to those individuals who pose the conflict issue. Staff Attorney Gramitt stated that the Petitioner has proposed an option and inquired whether it would be in compliance with the requirements of the Code, not whether he is required to do so. Legal Counsel Conley agreed, but he expressed concern that people may read the opinion more broadly. Chair Binder stated that if the Commission agrees that the Caprio law firm is a participant she would be uncomfortable with Option 1 because of the Petitioner's close relationship with his Chief of Staff. In response to Commissioner Heffner, the Petitioner represented that time is of the

essence here, as the victims have been waiting more than seven years through this process. He stated that he did not want to create further delay by participating and then having someone challenge the process and file a complaint. He advised that he will recuse either way.

In response to Commissioner Cheit, the Petitioner stated that the Caprio law firm has approximately 30 to 35 related cases. Commissioner Magro inquired whether the Commission would even get to the point of approving one of the options if it agrees that there is no actual conflict. Commissioner Cheit indicated that he has been persuaded that the firm is a participant, but he stated that he does not believe that there is a reason under the Code for him to recuse regarding the other individuals. Chair Binder agreed. Commissioner Lynch noted that the Commission could require recusal only as to the Caprio firm's clients, but the Petitioner could then apply recusal as to all. Chair Binder and Commissioner Cheit expressed that it would be the Petitioner's choice to do so.

Staff Attorney Gramitt stated that he would amend Option 1 to reflect that recusal is required as to applicants associated with the Caprio law firm and the Petitioner is free to act with respect to the remainder.

Chair Binder expressed that she does not believe Option 1 is a good option if recusal is going to be required. Staff Attorney Gramitt stated that he could amend the draft such that either option only applies to recusal relating to victims represented by the Caprio law firm.

Commissioner Heffner concurred with Chair Binder that it would be better to have the matter be handled outside of the Petitioner's office.

Upon motion made by Commissioner Butler and duly seconded by Commissioner Magro to adopt Option 2, as amended, there was discussion. In response to Commissioner Cheit, Staff Attorney Gramitt clarified that the amendment to Option 2 states that recusal is only required as to the victims who have an affiliation with the Caprio law firm. Upon the original motion, it was unanimously

VOTED: To adopt Option 2, as amended.

The next advisory opinion was that of Alfred W. DiOrio, PLS, CPESC, a Hopkinton Planning Board member. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Alfred W. DiOrio, PLS, CPESC, a Hopkinton Planning Board member.

The next advisory opinion was that of Robert Coulter, a member of the Tiverton Budget Committee. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. Upon motion made by Commissioner Cheit and duly seconded by

Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Robert Coulter, a member of the Tiverton Budget Committee.

The next advisory opinion was that of Danielle Coulter, a member of the Tiverton School Committee. Staff Attorney DeVault presented the Commission Staff recommendation, which addressed the identical issue presented in the prior opinion, which involved the Petitioner's spouse. Matthew Fabisch, Esq. was present for the Petitioner. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Danielle Coulter, a member of the Tiverton School Committee.

The next advisory opinion was also that of Danielle Coulter, a member of the Tiverton School Committee. Staff Attorney DeVault presented the Commission Staff recommendation. Matthew Fabisch, Esq. was present for the Petitioner. Attorney Fabisch suggested that under the Code the Petitioner need not recuse where her husband merely makes comment in a public workshop. He stated that public comment does not transmogrify the spouse's statement into an appearance before the School Committee. Commissioner Cheit indicated that he is uncertain whether he agrees with the draft opinion because one recuses from taking action, not listening.

Attorney Fabisch argued that it seems ridiculous to chase the Petitioner out of the room when her spouse engages in public comment.

Staff Attorney DeVault noted that after a member of the public makes comment there is likely to be discussion and questions. She indicated that the Staff felt more comfortable with recusal during that comment period only. In response to Commissioner Cheit, Staff Attorney DeVault informed that a workshop is a meeting of a public body under the Open Meetings Act. Chair Binder expressed that she is sympathetic to the Petitioner's position but the Commission may be constrained by the Code's language. She questioned the public policy reason behind the regulation. Staff Attorney DeVault expressed that many people hold the perception that individuals are more likely to be influenced by their spouses. Attorney Fabisch stated that the statute is clear that recusal is only necessary where there is a conflict of interest. Commissioner Butler pointed out that the public would not be denied the ability to hear the comment even if the Petitioner were required to recuse. He expressed that he can see where recusal would be appropriate, particularly given that you never know where a comment posed will end up, and there could be discussion or policy being made. Attorney Fabisch inquired whether the Commission wants to force these discussions to take place behind closed doors.

Commissioner Heffner stated that Commissioner Butler's remarks are

beginning to persuade him. He noted that spouses could agree to a certain course of action, and softball questions back and forth could tend to sway or shape the discussion. He wondered if that type of action would be problematic. Attorney Fabisch disagreed that there would be action because no vote would be taken. Commissioner Cheit observed that this is a workshop and all people are doing is presenting comment. Commissioner Lynch noted that an individual would take on advocacy for one position or another. Staff Attorney DeVault stated that the point of the workshop is to do something or not do something based upon what is heard. Commissioner Magro indicated that the board is forming opinions as to what it will ultimately do.

Commissioner Lynch expressed that he believes this is participation by a spouse. Chair Binder stated that whether the regulation is good public policy is another matter. She voiced her personal belief that spouses should be able to speak in a public forum where there is no financial impact involved. Commissioner Lynch noted that if it were a regular School Committee meeting the spouse could not appear without the Petitioner's recusal. Commissioner Cheit stated that it would be one thing if it just involves people getting up and making comment, but if there is back and forth discussion that might be something else. Attorney Fabisch referenced Advisory Opinion 97-10, which permitted public comment by a spouse, but which also was issued prior to the adoption of Regulation 5004. Upon motion made by Commissioner Magro and duly seconded by Commissioner

Lynch, it was

VOTED: To issue an advisory opinion, attached hereto, to Danielle Coulter, a member of the Tiverton School Committee.

AYES: J. William W. Harsch, Frederick K. Butler, Mark B. Heffner, James V. Murray, Edward A. Magro, John D. Lynch, Jr. and Barbara R. Binder.

NOES: Ross Cheit.

The next advisory opinion was that of W. Douglas Gilpin, Jr., FAIA, a member of the Block Island Historic District Commission. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made and duly seconded, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to W. Douglas Gilpin, Jr., FAIA, a member of the Block Island Historic District Commission.

The next advisory opinion also was that of W. Douglas Gilpin, Jr., FAIA, a member of the Block Island Historic District Commission. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Commissioner Cheit observed that the General Commission Advisory (GCA) is more

like a general Block Island opinion. In response to Commissioner Butler, Staff Attorney DeVault indicated that the Petitioner lives in Virginia but has a residence on Block Island. Commissioner Butler questioned whether it has to be an historic architect with a connection to Block Island. Staff Attorney DeVault replied that her assumption is that the District can choose who it wishes.

Commissioner Heffner suggested that as a matter under New Business the Commission should look at it issue by issue, rather than as a GCA for Block Island. In response to Chair Binder, Legal Counsel Conley advised that the GCA is only advisory, but, if the Commission chooses not to follow it, it must articulate a reason. In response to Commissioner Cheit, Staff Attorney Gramitt noted that this GCA is part of the Staff's ongoing review. Upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to W. Douglas Gilpin, Jr., FAIA, a member of the Block Island Historic District Commission.

The next order of business was a Review of Exemption for Abraham Kovoov, Ph.D., pursuant to the R.I. Public/Private Partnership Act. Dr. Kovoov was present with Louis Saccocia, Esq., General Counsel to URI. Staff Attorney Gramitt advised that the Commission has thirty days within which to review the exemption and, if it has concerns, it

has the ability to require the Board of Governors to reconsider it at a public meeting. He noted that the Commission otherwise need take no action. Dr. Kovoov provided the Commission with a brief explanation of the SBR grant and his research.

At 10:45 a.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

a.) Motion to approve minutes of Executive Session held on December 15, 2009.

**b.) In re: Melanie Turner,
Complaint No. 2009-5**

**c.) In re: Donna Hayden,
Complaint No. NF2009-7**

d.) Status Update:

**Joseph S. Larisa, Jr. v. Rhode Island Ethics Commission,
Superior Court C.A. No. 08-7325.**

e.) Motion to return to Open Session.

The Commission returned to Open Session at approximately 11:23 a.m. *Commissioners Butler and Heffner left the meeting.

The next order of business was a motion to seal minutes of the Executive Session held on January 12, 2010. Upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, it was unanimously

VOTED: To seal minutes of the Executive Session held on January 12, 2010.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on December 15, 2009; 2) approved a settlement in Complaint No. 2009-5, In re: Melanie Turner; 3) found that probable cause exists in Complaint No. NF2009-7, In re: Donna Hayden; and 4) received a status update in Larisa v. Rhode Island Ethics Commission.

The next order of business was an update from Legal Counsel regarding due process issues relative to: the Complainant's role in the complaint process; the right to jury trial in administrative proceedings; initial determinations; and preliminary investigations. Legal Counsel Conley informed that his second memorandum provides an expanded discussion of the Complainant's role, in light of the Supreme Court's comments in the Irons case regarding

application of the public rights doctrine. He indicated that he has presented the Commission with same language removing the Complainant's role in the process as previously put forth by Staff Attorney Gramitt.

As to initial determinations, Legal Counsel Conley informed that he has suggested policy language to ensure that the Commission does not become involved in the investigative process. He stated that he similarly has proposed policy language in the area of preliminary investigations to reaffirm the separation of the investigatory and adjudicative functions. Regarding probable cause, Legal Counsel Conley advised that he did not find much analysis or guidelines within the context of ethics commission findings. As such, he stated that his memorandum presents the federal model for application of a probable cause standard.

Chair Binder voiced her belief that the language presented as to the Complainant's role is appropriate and it is time to act on it. Commissioner Cheit urged the Commission to move on it right away and suggested that the language on page seven be noticed for rule-making. Chair Binder and Commissioner Cheit stated their comfort with the language. Staff Attorney Gramitt indicated that the language will be advertised for public comment. In response to Commissioner Harsch, Legal Counsel Conley advised that he does not believe there would be any impact on the Commission's prior actions.

In response to Commissioner Harsch, Senior Staff Attorney D'Arezzo informed that there would be no impact on the Larisa appeal given that he did not request a jury trial, nor did he raise it in his complaint. In response to Commissioner Lynch, Senior Staff Attorney D'Arezzo acknowledged that he could request a jury trial if rehearing were ordered; however, given his claims and the APA standard of review, such a scenario is unlikely. Commissioner Cheit noted that the Commission had been considering the Complainant's role prior to Irons. Chair Binder advised that the Commission needs to figure out where in its regulations to include the new policy language. She asked Staff to present the language proposed by Legal Counsel Conley for consideration at the next meeting.

The next order of business was discussion of proposed General Commission Advisory (GCA) 2009-3: Participation in Union Actions by Public Officials who are Union Members. Staff Attorney DeVault informed that the matter is on the agenda to provide Staff with direction regarding any further input needed. Chair Binder stated that in the end what was proposed was too broad. She noted that the Commission received a lot of good comments. She suggested that the Commission really needs to think about how to define business associate to capture this type of financial nexus. She stated that, initially, it may be possible to address a very specific problem through an individual advisory opinion, such as the appearance of impropriety with the school committee member situation.

Staff Attorney DeVault indicated that she appreciated the comment from the Block Island Superintendent of Schools, which noted that there are many gradations to the statewide representative's involvement in contract situations. She voiced the Staff's sentiment that the determinations would be so factually specific that it might be better to approach the issue through incremental advisory opinions. She suggested that the next such request might be presented as a long track opinion with options to choose from. Chair Binder stated that she would prefer that approach and Staff Attorney Gramitt can alert individuals that there may be a policy shift on these issues as part of the educational program.

Commissioner Cheit agreed that taking an incremental step is the easiest way to address the issue and makes sense, but he questioned at what point the Commission needs to do something else. He voiced his frustration with the perception that the Commission is singling out unions. He stated that it seems at some point there will be a need for a GCA or a rule. Chair Binder indicated that she could see a GCA addressing school committee members who are teachers in other districts. Staff Attorney DeVault advised that the perception of singling out unions is backwards. She informed that the business associate analysis has always existed, but the Commission is just now including unions within it. Commissioner Cheit expressed that if these issues keep arising, it would suggest to him there is a need to do something else. He suggested that if the Commission were to

adopt a GCA or a rule it would have to be small in scope.

Commissioner Harsch concurred. He noted that something has to be done and the Commission has stated that it is not comfortable with the present situation. He expressed the need to let people know of the policy change. Commissioner Magro stated that there seemed to be a consensus on how the Commission will be interpreting these issues going forward. Chair Binder indicated that she would like to see the policy change start with the school committee member situation, which is repeatedly before the Commission. In response to Commissioner Cheit, Staff Attorney DeVault stated her belief that it would not necessarily make sense to make a generalized statement as to school committee members because the situations are so fact specific.

Executive Director Willever voiced his support for bright line rules, which make prosecution less arbitrary. He advised that an advisory opinion really amounts to immunity from prosecution. Commissioner Cheit observed that incremental opinions may work well if people keep coming to the Commission with these issues, but they will not assist in the complaint context. Commissioner Harsch stated that the issue will not go away without litigation. Staff Attorney Gramitt advised that the Commission previously had some matters dismissed that were appeals from advisory opinions. Commissioner Lynch suggested that, based upon the comments made, someone will test the issue.

Executive Director Willever indicated that rule making could have unintended consequences. In response to Commissioner Cheit, he stated that a GCA or regulation would be helpful, but he also noted that facts can change. He advised that the way the Commission is handling the issue now has not been challenged, but if the Commission were to make a change, it could invite a whole arena of problems not yet considered. Staff Attorney DeVault suggested that the Commission re-examine the business associate analysis itself in a larger context, referencing prior advisory opinions addressing other membership organizations like the YMCA, Chamber of Commerce and Tiverton Yacht Club. Commissioner Cheit indicated that review of those opinions would be helpful to see if there is a better way to address the issue. Commissioner Harsch pointed out that the law recognizes collective bargaining in only one organization, the union.

Staff Attorney DeVault suggested that if the Commission were to consider a GCA regarding school committee members, it perhaps should consider whether to do so under a conflict of interest analysis versus a business associate analysis. She noted that the business associate analysis provides for more gradations, but a straight conflict analysis might be cleaner. Chair Binder suggested looking at it both ways. Staff Attorney DeVault stated that if the Commission desires the Staff can draft a potential GCA regarding school committee members. Commissioner Magro informed that he is still comfortable with the original proposal. Commissioner Lynch

cautioned that addressing school committee members specifically might be getting to the issue of an individual's ability to be a school committee member, disenfranchising a teacher from being a school committee member in his or her own town. Commissioner Cheit noted that Steve Brown had raised that issue during public comment. He also noted that the public knows these individuals are teachers when it elects them to office. Commissioner Lynch expressed that he does not want to focus on one group of people and perhaps the legislature should define "business associate" and the Commission can apply it.

***Commissioner Harsch left the meeting at 12:05 p.m.**

In light of the potential policy shift, Commissioner Lynch inquired what the Commission can do about the people who already came for guidance and are not coming back. He indicated that people potentially will defend against application of a GCA by arguing that their facts are slightly different. Commissioner Magro stated that the Commission must put people on notice that it is thinking differently from the body of advisory opinions that is out there. He indicated that the Commission is clarifying its position, not picking on any particular group. In response to Commissioner Lynch, Legal Counsel Conley advised that the comparability analysis applies to all municipal contracts.

***Commissioner Harsch returned at 12:14 p.m.**

Commissioner Magro voiced support for taking a second vote on the original proposal. Commissioner Lynch stated that the Commission needs to be more direct and specific regarding what it is going to do. Chair Binder stated that she does not believe the Commission is ready to vote. In response to Chair Binder, Staff Attorney DeVault indicated that she might have made some changes to the proposed GCA, particularly in light of the New Shoreham Superintendent of Schools' comment about not being a business associate of another local. Commissioner Magro stated that the proposal is a general statement not intended to cover every fact pattern and the Commission should move forward on it. Commissioner Harsch agreed that it should be put to an up or down vote at the next meeting. Commissioner Lynch suggested that it be noticed for discussion and vote. Chair Binder and Commissioner Cheit concurred.

***Commissioner Murray left the meeting at 12:19 p.m.**

The next order of business was review and discussion of Staff research regarding state gift prohibitions. Staff Attorney DeVault summarized her research of other states' gift prohibitions. She pointed out that the Kentucky provision seemingly could be applied to national trade associations. Chair Binder expressed her belief that the Kentucky provision is good. Commissioner Cheit stated that he found the research helpful. He noted that he also liked the language

used by Arkansas and asked for a copy of the advisory opinion referenced. Commissioner Cheit also indicated that he would like to consider the Kentucky provision. He asked that a copy of the Staff's memorandum be provided to the individual who petitioned for an amendment to the gift regulation. He stated that the Commission should workshop the issue when it has a couple of alternatives to consider, likely including the Kentucky language. Chair Binder asked Staff to place this on the list of items to address, although not at top priority.

The next order of business was the Director's Report. Executive Director Willever reported that there are seven complaints and three advisory opinions pending. He informed that one formal APRA request has been granted since the last meeting and there is one Superior Court appeal pending.

The next order of business was New Business proposed for future Commission agendas. Chair Binder stated that the Commission should address the issues of spouses providing public comment and the revocation of GCA 8, but these items are not high priority.

At approximately 12:24 p.m., upon motion made by Commissioner Lynch and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary